Supreme Court, U.S.
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No. 08-165

IN THE

Supreme Court of the United States

TEJPAL SINGH,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

On Petition For Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 9, 2008

QUESTION PRESENTED

Whether the prosecution abused its discretion in denying immunity to a defense witness where the witness had been directly implicated in the murder for which petitioner was on trial, where ballistics evidence and witness statements suggested multiple shooters, and where the prosecution did not otherwise engage in misconduct or build its own case on immunized testimony.

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No. 08-165

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2008

TEJPAL SINGH,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

On August 25, 1996, Kamaljit and Ramjit Singh were shot while standing with others on a street corner in Queens, New York. Petitioner, who was riding in an SUV with tinted windows along with several other

members of his group, was seen firing out the front passenger window of the vehicle at the two men. Both victims were shot in the back as they attempted to flee. Ramjit survived but Kamaljit died at the hospital shortly after the incident. Ballistics evidence recovered from the scene of the crime included .45 caliber shell casings and a .38 caliber bullet, prompting a ballistics examiner to conclude that two weapons had been used in the shooting.

Despite an extensive search by the New York City Police Department, petitioner was not located until four years later when evidence was found of telephone calls from petitioner's family to Canada. With the assistance of Canadian law enforcement authorities, petitioner was arrested in August of 2000 and extradited to the United States.

For his acts, petitioner was charged with acting in concert to murder Kalamjit Singh (New York Penal Law § 125.25[1],[2] [two counts]), and with the attempted murder and first-degree assault of Ramjit Singh (New York Penal Law §§ 110/125.25[1]; 120.10 [1],[3] [two counts]).[1]

Petitioner proceeded to trial before the Honorable Michael B. Aloise, Justice of the New York State Supreme Court, and a jury. In the prosecutor's

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[1]Petitioner was also charged, under an acting-in-concert theory, with Reckless Endangerment in the First Degree (New York Penal Law § 120.25), Criminal Possession of a Weapon in the Second Degree (New York Penal Law § 263.03), and Criminal Possession of a Weapon in the Third Degree (New York Penal Law § 265.02[4]).

opening statements, she discussed the "two guns" theory, explaining that she could not tell the jurors if there was a second shooter or if petitioner had two guns, but maintaining that it did not matter because petitioner was charged with acting in concert with others to commit the crime. During the state's case, Ramjit, who knew petitioner prior to this incident, testified about the shooting and identified petitioner as firing a weapon from the front passenger seat. Another witness, Sukjinder Singh, who had been standing on the sidewalk with the two victims prior to the shooting and who also knew petitioner prior to the shooting, identified petitioner as being in the car. Police witnesses described the collection and microscopic comparison of the ballistics evidence, including the .45 caliber shell casings found on the street and the .38 caliber bullet found just inside the building on the corner where the shooting took place.[2]

In his defense, petitioner offered statements taken from four witnesses as declarations against penal interest. Three of these statements suggested that another man, Anu Singh, had fired a weapon, and two of the statements indicated that there had been more than one shooter. In one of the statements, "Jassa" Singh, who resided in India at the time of trial, told a defense investigator that he was in the SUV when shots were fired and he identified two men, Anu Singh and "Vicki," as both possessing weapons and having fired out the window. According to Jassa, one

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[2]This bullet was found near a shirt bearing a fresh blood stain. The shirt's owner was never located.

man reached across another to fire his weapon. "Vicki," who resided in Canada at the time of trial, also made a statement to a defense investigator, and, although he claimed that he did not see the shooting, "Vicki" believed Anu had fired because Anu was seated on the front passenger side of the SUV. In another statement, one "Lali" indicated that, although he was in the car from which the shots were fired, he did not see the shooting because he was frightened and ducked when he heard gunfire. Finally, Anu Singh made a statement to police investigators indicating that two men possessed weapons on the evening of the shooting. Anu's written statement was read into the record, in part, as follows:

> I know Jassa and Vicki had gun because I see in the house with the guys we are traveling in the, it looks like, I'm not sure of the word. I am not sure of the word. Jinder saw the guys Goldie, Rocky, some other people in the street went. We were went. We were – I don't know the word there. Vicki said to me move back and saw gun in hand. The pat to the window he was. I don't know the word. Jassa came to front and he pulled the gun out the same window then somebody also then we something Jinder house. We went to the homes and left Jinder house and left with Tej [petitioner].

After an extensive colloquy, the trial court refused to admit these statements as declarations against penal interest. The trial court reasoned that

none of the declarants had indicated his own complicity in the shooting.

Defense counsel also sought to obtain the live testimony of Anu, who lived in Georgia at the time of trial. After Anu was asked to testify, he spoke with an attorney who worked for his employer in Georgia. Anu subsequently declined to cooperate, refusing to appear at the trial. As a result, the trial court authorized service of a subpoena and signed a material witness order to produce Anu. When Anu was brought to New York, he was accompanied by his Georgia attorney, and petitioner's attorney also asked a colleague from New York to assist in the representation of the witness. Anu took the stand outside the presence of the jury and invoked the Fifth Amendment in response to all questions posed.

Defense counsel then requested that "the People convey immunity upon this individual so he may testify on behalf of the defendant." In response, the prosecutor, who under New York law could confer only transactional immunity on the witness (*see* New York Criminal Procedure Law §§ 190.40, 50.20), declined to do so. She cited the ballistics evidence that two guns were involved in the incident, and the court noted that three of the statements offered by petitioner indicated that the witness possessed one of those weapons. Petitioner's subsequent mistrial motion on this ground was denied.

On appeal to the New York State Appellate Division, Second Judicial Department, petitioner argued that the trial court erred in failing to admit the

witness's statements as declarations against penal interest and that the prosecutor abused her discretion in denying counsel's request to immunize Anu. Petitioner did not argue, however, that the court had "inherent authority" to grant immunity to the witness and should have done so independent of the prosecutor's decision. The Appellate Division affirmed the judgment. *People v. Singh*, 47 A.D.3d 733 (2d Dept. 2008). The court specifically held that "[t]he defendant's claim that the prosecutor abused her discretion by denying immunity is without merit," citing New York's transactional immunity statute and *People v. Chin*, 67 N.Y.2d 22 (1986), which holds that a prosecutor who grants immunity to a defense witness necessarily confers full transactional immunity under New York law. 47 A.D.3d at 734.

Petitioner subsequently sought leave to appeal to the New York Court of Appeals, arguing once again that the prosecutor abused her discretion. Petitioner did not argue that the trial court had the inherent authority to immunize the witness, independent of the prosecutor's decision. A judge of the New York Court of Appeals denied leave to appeal, without opinion. *People v. Singh*, 10 N.Y.3d 870 (2008).

Petitioner now seeks a writ of certiorari directed to the Appellate Division, New York's intermediate appellate court.

REASONS FOR DENYING THE WRIT

Petitioner argues that this Court should grant certiorari because of a split among the federal circuit

courts as to the circumstances under which a prosecutor may be compelled to grant immunity to allow a defense witness to testify. This argument should be rejected, and certiorari denied, for at least two reasons. First, contrary to petitioner's claim, no split of authority currently exists on this issue, as only one circuit has at any time deviated from what petitioner describes as the "majority view," and that circuit has since limited its sole errant decision strictly to its facts, effectively eliminating its precedential value. Second, in this case, the outcome would be the same regardless of whether the issue were analyzed under the majority view or the lone, now discredited case adopting a different position. Thus, petitioner has failed to establish a genuine conflict or that this case presents facts that would implicate the purported distinction among the circuits. Moreover, in making his conflict argument, petitioner conflates two separate issues, only one of which was properly raised in state court, and thus only one of which would be reviewable here. For these reasons, this Court should decline to grant review in this case.

A. The Question of Whether a State Court Has the Inherent Authority to Grant Immunity is Not Reviewable in This Court.

At the outset, it is important to distinguish between two related but analytically distinct issues identified by petitioner in the body of the petition, only one of which would be properly before this Court should it grant review. In his "Reasons for Granting the Writ," petitioner first raises the issue of whether a

court possesses the inherent authority to grant immunity to a defense witness when the prosecution denies it. Petition at 9. This issue raises questions concerning the historical jurisdiction of state and federal courts, whether provisions of the bill of rights may be read to confer jurisdiction on a state or federal court that it does not otherwise possess, and whether a court would offend the separation of powers clause by usurping authority otherwise reserved to the prosecution. *See, e.g., United States v. Turkish*, 623 F.2d 769, 773-76 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *Government of Virgin Islands v. Smith*, 615 F.2d 964, 969-74 (3d Cir. 1980). The second, analytically distinct issue is whether, under a given set of circumstances, a prosecutor may be deemed to have abused his or her discretion in declining to grant immunity. *See* Petition at 10; *Smith*, 615 F.2d at 969-70; *United States v. Ebbers*, 458 F.3d 110, 119-120 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 1483 (2007). This issue raises questions concerning the conduct of the prosecutor and his or her possible overreaching, rather than the jurisdiction possessed by the trial court.

The first issue is not presented by this case because petitioner did not properly present that contention to the state courts. It is the "settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987) (internal quotation marks and citations omitted); *see also Cardinale v. Louisiana*, 394 U.S. 437

(1969); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). This is because, among other things, in a federal system, it is important for the state courts to consider the federal constitutional issue first before the federal judiciary steps in to correct any error. *Cardinale*, 394 U.S. at 438; *Illinois v. Gates*, 462 U.S. 213, 221 (1983). In order to comply with the requirement that the issue first be presented to the state courts, the petitioner must raise the issue not only in the trial court but also on appeal. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); Eugene Gressman, Kenneth Geller, Stephen Shapiro, Timothy Bishop, and Edward Hartnett, *Supreme Court Practice* § 3.18(c) (9th ed. 2007). This includes raising the issue in the state's highest court and, if different, in the court that issued the decision that this Court is asked to review. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review"; citations omitted); *Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (equal protection issue not reviewable because not raised in state supreme court, although other constitutional issues properly presented).

Here, petitioner failed to raise the "inherent authority" issue properly in either state appellate court.[3] On appeal to the intermediate appellate court,

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[3]In the trial court, petitioner stated at one point, "I would ask the court to convey immunity on [the witness]." Petitioner did not,

which issued the decision that petitioner now asks this Court to review (Petition at 1), petitioner argued that the prosecution abused its discretion by not granting immunity, but did not argue that the court had the inherent power to grant immunity or that it should have done so over the prosecutor's objection. Similarly, in his application for discretionary review in the state's highest court, petitioner again raised the issue only in terms of the prosecutor's abuse of discretion, rather than the inherent authority of the court to grant immunity. Because petitioner failed to raise this contention in either of these courts, the issue would not properly be before this Court for its consideration if certiorari were granted.

Indeed, this circumstance alone provides sufficient cause to deny the petition. Should the Court grant certiorari, its review of the issues potentially raised under circumstances such as those here would be severely truncated. The "inherent authority" issue is frequently raised in cases such as petitioner's, but this Court would be unable to address that issue in this case. Moreover, many of the cases cited by petitioner in connection with the purported split of authority among the circuits involve the "inherent authority" issue. Thus, the split, if indeed there is any at all, largely involves a question not presented by this case. For these reasons alone, this Court should decline to grant certiorari.

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however, invoke the "inherent authority" of the court, either as derived from state case law or federal constitutional principles.

B. No Conflict Exists Among the Circuit Courts on the Question Raised by Petitioner.

Petitioner argues that the circuit courts have used two different "modes of analysis" in determining whether a prosecutor may be compelled to grant immunity to a defense witness. According to petitioner, one view adopts an "effective defense" theory, under which a court may exercise inherent authority to immunize a witness if the witness is required for an effective defense. Petition at 20. The "prosecutorial misconduct" view, on the other hand, allows a court to dismiss a case or order a prosecutor to grant immunity when the prosecutor has overreached, by, for example, intimidating the defense witness with threats of prosecution or building his case on immunized testimony. Petition at 21. Contrary to petitioner's claims, no split of authority currently exists among the circuit courts sufficient to warrant review here. The sole circuit that purportedly adopted the "effective defense" theory has posited this theory solely with regard to the "inherent authority" question not presented by this case. Moreover, that court has since limited its own case strictly to its facts, virtually eliminating its precedential value. Accordingly, petitioner has failed to establish a "substantial conflict" warranting a grant of certiorari in this case. *See Boggs v. Boggs*, 520 U.S. 833, 839 (1997).

According to petitioner, the "effective defense" theory was adopted by the Third Circuit twenty-eight years ago in the case of *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). There, the Third Circuit first addressed whether the prosecution had

abused its discretion in declining to grant immunity. On this issue, the court, after finding a *prima facie* case of prosecutorial misconduct, remanded the matter for an evidentiary hearing to determine whether the prosecutor acted with the "deliberate intention of distorting the fact-finding process." *Id.* at 969. Such a finding, according to the court, would justify dismissing the case unless the prosecution consented to confer statutory immunity. The court alternatively theorized, however, that a trial court may have its own inherent authority to grant immunity under certain circumstances, regardless of the objection of the prosecution. Such a grant of authority would be "clearly limited," requiring a showing, *inter alia*, that the proffered testimony is clear, unambiguous, and exculpatory, the testimony is essential to the defense, and the government has no strong countervailing interest.

This single case is insufficient to establish a substantial split of authority for several reasons. First, on the only issue presented by the case at bar – the circumstances under which a prosecutor will be deemed to have abused his or her discretion in denying immunity – *Smith* is consistent with the other federal circuits that require a showing of serious prosecutorial misconduct. Indeed, on this issue, *Smith* specifically required the defense to establish, at an evidentiary hearing, that the prosecutor engaged in misconduct by refusing to grant immunity "with the deliberate intention of distorting the fact-finding process." *Id.* at 969. As the Third Circuit specifically stated with regard to this issue, "Absent this type of prosecutorial misconduct, defendant is foreclosed from insisting that

statutory immunity be granted his witness." *Id.* at 968. Moreover, before even taking the step of remanding for a hearing, the Third Circuit first found a *prima facie* case of prosecutorial misconduct. *Id.* at 969. Thus, as to this issue, the Third Circuit's decision requires a showing of serious prosecutorial abuse, just as do the circuits cited as having adopted the "prosecutorial misconduct" standard. *Id.* at 968-69.

Second, even on the inherent-authority issue, the Third Circuit quickly limited the *Smith* decision to its own specific facts. Indeed, the Third Circuit has expressly acknowledged that "*Smith* has subsequently been limited to its particular facts by this court." *United States v. Santtini*, 963 F.2d 585, 598 n. 6 (3d Cir. 1992); *see United States v. Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (comparing and distinguishing facts of *Smith* and declining to extend *Smith* beyond those facts). And in the twenty-eight years since *Smith* has been decided, the Third Circuit has never concluded that *Smith* required or permitted a trial court to grant immunity, despite the frequent efforts of defendants to take advantage of the *Smith* decision.[4] In addition,

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[4]*See Virgin Islands v. Edwards*, 233 Fed. Appx. 167 (3d Cir. 2007); *United States v. Leary*, 206 Fed. Appx. 111 (3d Cir. 2006); *United States v. Gaudelli*, 134 Fed. Appx. 565 (3d Cir. 2005); *United States v. Thomas*, 357 F.3d 357 (3d Cir. 2004); *United States v. Mack*, 78 Fed. Appx. 171 (3d Cir. 2003), *cert. denied*, 541 U.S. 956 (2004); *United States v. Cohen*, 171 F.3d 796 (3d Cir. 1999); *United States v. Hamilton*, 46 F.3d 271 (3d Cir. 1995); *United States v. Santtini*, 963 F.2d 585 (3d Cir. 1992); *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied sub nom. Stillman v. United States*, 363 U.S. 936 (1983); *United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983); *United States v. Steele*, 685 F.2d 793 (3d Cir.), *cert. denied sub nom. Mothon v. United States*,

since *Smith*, trial courts within the Third Circuit have noted the extremely limited applicability of that case, particularly in light of this Court's intervening pronouncement in *Pillsbury Co. v. Conboy*, 459 U.S. 248, 260-61 (1983), that "[n]o court has authority to immunize a witness." *See, e.g., United States v. Payment Processing Co.*, 443 F.Supp.2d 728, 733 (E.D. Penn. 2006) (questioning whether *Smith* could be reconciled with this Court's statement in *Conboy*, explaining *Smith's* "limited vitality," and stating that "*Smith*'s reach is most likely limited to misconduct involving the government's use of the immunity process itself"); *United States v. Pratt*, 2007 U.S. Dist. Lexis 41155 *3-4 (W.D. Pa. June 6, 2007) (Third Circuit "consistently has limited Smith to its unique facts"); *United States v. Throckmorton*, 2006 U.S. Dist. Lexis 8372 *4 (W.D. Pa. March 3, 2006) (noting that Third Circuit has never applied *Smith* to authorize grant of judicial immunity and that *Smith* has been limited to its facts).

Moreover, since *Smith*, the Third Circuit has suggested that its finding of inherent authority was based on the court's supervisory powers over lower federal courts. *United States v. Acetturo*, 783 F.2d 382, 396 (3d Cir. 1986) ("In various circumstances, this court has used its inherent supervisory power to establish rules that will effectuate the defendant's constitutional rights"; citing *Smith*). This would explain the absence of any Third Circuit case in the last 28 years discussing *Smith* as applied to state court judgments.

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459 U.S. 908 (1982); *United States v. Lowell*, 649 F.2d at 950.

In short, since *Smith* was decided, the doctrine has been so limited by the court that created it that its precedential value is virtually nil, and its effect virtually non-existent, even within the Third Circuit. Thus, *Smith* is hardly sufficient by itself to create a genuine conflict worthy of this Court's review.

Petitioner also contends, however, that the Ninth Circuit has adopted *Smith*'s effective-defense theory, at least to some degree. *See* Petition at 20. This is not so. In *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983), cited by petitioner, the Ninth Circuit adopted only the "prosecutorial misconduct" portion of the *Smith* opinion, remanding for a hearing based on an "unrebutted *prima facie* showing of prosecutorial misconduct." *Id.* at 891. In fact, the Ninth Circuit, referencing the "inherent authority" portion of the *Smith* opinion, expressly stated that it was not "address[ing] this alternative theory." *Id.* at 891 n.2. More recently, the Ninth Circuit has made clear that it requires a showing of prosecutorial misconduct when the defense claims that a defense witness should have been immunized. *Williams v. Woodford*, 384 F.3d 567, 600 (9th Cir. 2004) (requiring showing that "(1) the witness's testimony would have been relevant, and (2) the prosecution refused to grant the witness use immunity with the deliberate intention of distorting the fact-finding process"), *cert. denied sub nom. Williams v. Brown*, 546 U.S. 934 (2005).

Moreover, contrary to petitioner's further suggestions, the minor variations among the courts adopting the "prosecutorial misconduct" mode of analysis do not establish a difference of opinion

warranting review. First, these circuit courts have all uniformly and unequivocally rejected the alternative theory in *Smith* allowing a court to grant immunity based solely on the defendant's need for an effective defense. *See United States v. Anguilo*, 897 F.2d 1169 (1st Cir. 1990) (citing "nearly universal" rejection of effective-defense theory and collecting cases), *cert. denied sub nom. Granito v. United States*, 498 U.S. 845 (1990); *United States v. Capozzi*, 883 F.2d 608, 613-14 (8th Cir. 1989) ("Every court of appeals which has considered the question has rejected the Third Circuit's *Smith* holding"), *cert. denied*, 495 U.S. 918 (1990); *see also United States v. Castro*, 129 F.3d 226, 232 (1st Cir. 1997) (referring to the "late, unlamented effective defense theory"), *cert. denied*, 523 U.S. 1100 (1998). Second, all of the circuit courts that have been squarely confronted with the issue have articulated the same fundamental requirements for compelling a prosecutor to grant immunity: a substantial showing of prosecutorial overreaching, often phrased in terms of a deliberate attempt to distort the fact-finding process or to intimidate a witness, and a showing of the defendant's need, usually including the clear exculpatory value of the testimony and the inability to obtain the testimony elsewhere. This test, with only slight variations, has explicitly been adopted by the Second, Fourth, and Ninth Circuits.[5] The Eighth

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[5] *See United States v. Ebbers*, 458 F.3d 110, 119-20 (2d Cir. 2006) (requiring demonstration of overreaching, that proffered testimony is "material, exculpatory and not cumulative," and that evidence is "[not] obtainable from any other source"), *cert. denied*, 127 S.Ct. 1483 (2007); *United States v. Washington*, 398 F.3d 306, 310 (4th Cir.), *cert. denied*, 545 U.S. 1109 (2005) (requiring "decisive showing of prosecutorial misconduct or overreaching"

Circuit has similarly adopted this view, requiring in separate cases that the proffered evidence be "clearly exculpatory," *United States v. Kehoe*, 310 F.3d 579, 591 (8th Cir. 2002), *cert. denied*, 538 U.S. 1048 (2003), and that the defendant make "a 'substantial evidentiary showing' that the government intended to distort the judicial fact-finding process," *United States v. Washington*, 318 F.3d 845, 855 (8th Cir.), *cert. denied*, 540 U.S. 899 (2003) (citations omitted). The First Circuit, in rejecting *Smith*, has adopted the Second Circuit view, specifically citing the need for a showing of intentional misconduct, including witness intimidation by threats of prosecution or, again, the deliberate distortion of the fact-finding process. *See United States v. Mackey*, 117 F.3d 24 (1st Cir. 1997); *United States v. Anguilo*, 897 F.2d at 1169. And the Tenth and Eleventh Circuits, while rejecting *Smith* and adopting the prosecutorial misconduct view, have simply not had occasion to spell out a more detailed version of the test. *See United States v. Serrano*, 406 F.3d 1208 (10th Cir.), *cert. denied*, 546 U.S. 913 (2005); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987); *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984). Thus, petitioner has failed to establish that decisions of the circuit courts are in any meaningful way inconsistent with one another.

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and that "the proffered evidence would be material, exculpatory, and unavailable from all other sources"); *Williams v. Woodford*, 384 F.3d 567, 600 (9th Cir. 2004) (requiring showing that prosecution refused to grant immunity with deliberate intention of distorting fact-finding process and demonstration of relevance of witness's testimony), *cert. denied sub nom. Williams v. Brown*, 546 U.S. 934 (2005).

In addition, the New York Courts have expressed views consistent with these decisions. New York cases have required a grant of immunity upon a showing of prosecutorial abuse, such as when the prosecutor has built his case on immunized testimony but denied the same to the defendant or affirmatively threatened the witness in question with prosecution. *United States v. Dolah*, 245 F.3d 98 (2d Cir. 2001); *United States v. Bahadar*, 954 F.2d 821 (2d Cir.), *cert. denied*, 506 U.S. 850 (1992). And, like the federal courts, the state courts have also emphasized the importance of a showing that the proffered testimony is exculpatory and vital to the defense. *People v. Owen*, 63 N.Y.2d 824 (1984); *People v. Shapiro*, 50 N.Y.2d 747 (1980). These cases, then, fail to demonstrate any federal/state conflict warranting review here.

Furthermore, the two dissenting opinions from denials of certiorari upon which petitioner so heavily relies do little to suggest that certiorari should be granted here. Both those dissents raise only the issue of the inherent authority of a court to grant immunity, an issue not presented by this case. *See Hunter v. California*, 498 U.S. 887 (1990) (discussing need to review question of "judicial immunity"); *Autry v. McKaskle*, 465 U.S. 1085, 1087 n.3 (1984) ("Petitioner contends that the trial court committed constitutional error when it refused to grant use immunity to [defense witness]"). Moreover, both view that issue from the perspective of the outdated legal landscape existing more than eighteen years ago, when the *Smith* decision could still have been seen as having some vitality. Finally, the views in these dissents quite obviously failed to command a majority of the Court,

and this Court's more recent denials of certiorari on this issue failed to raise any disagreement whatsoever on the worthiness of this contention for review in this Court. *See, e.g., Ebbers v. United States*, 127 S.Ct. 1483 (2007); *Ko v. New York*, 546 U.S. 1093 (2006). Because petitioner has presented no new or better reason for this Court to grant review than was previously available, this Court should deny certiorari in this case.

C. Under the Facts Present Here, the Outcome Would be the Same Regardless of the Theory Espoused.

Under the facts of this case, the trial court's refusal to force the prosecution to grant immunity would be upheld under either the prosecutorial-misconduct theory or the Third Circuit's effective-defense theory as articulated in *Smith*. As a result, this case presents a poor vehicle for resolution of the supposed conflict.

Initially, there is no question that the prosecution's conduct here passes muster under the "prosecutorial misconduct" test. At no point did the prosecution engage in the type of overreaching conduct cited by the courts espousing this theory. The prosecution in no way threatened Anu Singh, the witness petitioner attempted to call; indeed, there is no indication that the prosecutor so much as spoke to the witness at any time. Moreover, at the time the police spoke to the witness, he was fully cooperative, and the record reflects that Anu's later refusal to testify was the result of his consultation with his employer's

attorney in Georgia, long before he arrived in New York. Morever, it was defense counsel who secured a New York attorney for the witness, who also advised him to invoke the Fifth Amendment. Thus, the prosecution was in no way responsible for the witness's invocation of the privilege.

Similarly, the prosecution did not build its case with immunized testimony and then refuse to immunize defense witnesses. The prosecution's case did not include the testimony of any accomplice, but, rather, rested on the eyewitness testimony of the surviving victim and other witnesses who happened to be at the scene. Nor is there any indication that the prosecution deliberately sought to distort the fact-finding process in any way. Accordingly, no basis exists for finding that the prosecutor engaged in abuses sufficient to fall within the showing required by the prosecutorial misconduct test.

The facts here would also not support reversal under the effective defense theory articulated in *Smith*. In *Smith* itself, the Third Circuit recognized that a court's inherent authority to confer immunity must be "bounded by special safeguards" and "made subject to special conditions." 615 F.3d at 971-72. Thus, the court stated that the defense must make a "convincing showing" that the defense witness is available to testify; the proffered testimony is "clearly exculpatory," the testimony is "essential" to the defense, and there is no strong governmental interest in denying immunity. *Id.* at 972. Under these standards, "[i]mmunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it

is found to relate only to the credibility of the government's witnesses." *Id.* Similarly, immunity will be denied if the testimony is likely to be severely impeached. *United States v. Perez*, 280 F.3d 318, 348 (3d Cir. 2002), *cert. denied*, 537 U.S. 859 (2002). Additionally, a "potential prosecution of the prospective witness is a sufficient governmental interest to countervail a grant of judicial immunity." *See United States v. Cohen*, 171 F.3d 796, 802 (3d Cir. 1999) (upholding denial of judicial immunity where witness "under investigation"); *United States v. Lowell*, 649 F.2d at 965 (upholding denial of judicial immunity and noting prosecution's "arguable reason" for denying immunity based on possibility of future prosecution).

This case fails to satisfy these standards on several grounds. First, the proffered testimony lacked clarity and was ambiguous at best. Indeed, Anu's statement, as read to the trial court, was barely intelligible in many respects – consistently interrupted by wholly unintelligible words and phrases. The statement also contains no reference to times. At best, it suggests that at some point while he was in the car on the evening of the shooting, Anu saw two individuals other than petitioner pull out guns, but the witness fails to indicate that the weapons were fired at that time. Perhaps more importantly, Anu made other inconsistent statements as well, including one which, according to petitioner, indicated that Anu was not in the SUV at the time of the shooting. *See* Petition at 6. Thus, at the time the proffer was made, it was not at all clear what the substance of the witness's testimony would be.

Second, the witness was subject to substantial impeachment. The witness's differing versions of events would provide fertile ground for impeachment by the prosecution, as would the witness's close friendship with petitioner and joint membership in the group that was a rival to the victims'.

Third, the state had a more than adequate interest in denying immunity. As the prosecutor told the jury in her opening statement, evidence in the case suggested that there might have been more than one shooter. Ballistic evidence recovered at the scene included different caliber bullets, one of the statements offered by the defense also indicated that there were multiple shooters, and Anu's statement suggested that more than one person in the car possessed weapons. In addition, several of the statements, including Jassa's, indicated that Anu was one of the shooters. Jassa claimed to have seen Anu and another firing, and two other statements also indicated that Anu had fired a weapon from the car. Indeed, petitioner steadfastly maintained at trial that Anu was in fact a shooter, although he argued that Anu was the only one who fired. Thus, there existed substantial evidence of Anu's direct involvement in the fatal shooting, a circumstance that would legitimately prompt any prosecutor to deny immunity.

Furthermore, contrary to petitioner's contention (Petition at 36), no evidence excluded the possibility that Anu was a shooter. The vehicle from which the shots were fired had tinted windows, which could easily have obscured a second shooter. This is particularly true if, as Jassa suggested, one of the

shooters reached across another shooter to fire his weapon. Moreover, because the two victims, who were shot in the back, turned and ran as gunfire erupted, they may well have failed to observe the second shooter, particularly if the second assailant began firing after the first. In addition, because the shots were fired from inside the SUV, discharged shell casings from an additional weapon would not necessarily be found on the street, although at least one different-caliber bullet was found near the scene. Nor did the fact that the fatal bullet and the .45 caliber shell casings matched preclude a second shooter. Indeed, this fact established only that the shooter who fired the .45 caliber weapon had managed to hit his target, not that no one else could have fired a weapon in the direction of the victims.

Furthermore, under New York law, the prosecution would have been required to grant the witness transactional immunity, and not just use immunity. As the New York Court of Appeals has noted in considering whether prosecutors have abused their discretion in denying immunity to defense witnesses, while the constitution requires only use immunity to overcome the assertion of the Fifth Amendment privilege, "[o]ur immunity statutes (CPL 190.40, 50.20) . . . grant full transactional immunity for any topic discussed by the witness within the scope of the proceeding (*see, Matter of Brockway v Monroe*, 59 NY2d 179, 189; *People v Perri*, 53 NY2d 957, *affg* 72 AD2d 106; *People v McFarlan*, 42 NY2d 896, *revg* 52 AD2d 112, *on opn* at 89 Misc 2d 905), and prosecutors are, therefore, understandably reluctant to request that such immunity be conferred." *People v. Chin*, 67

N.Y.2d at 33 n. 4. Thus, here, the prosecution would have had to have conferred full transactional immunity on Anu, foregoing any future prosecution of him regardless of evidence that might later become available. Under these circumstances, the district attorney's office was "understandably reluctant" to forego ever bringing Anu, a likely participant in the shootings, to justice.[6]

Moreover, contrary to petitioner's contention, the fact that the prosecution had declined to charge Anu prior to petitioner's trial based on the evidence that was then available does not suggest that the prosecution had no interest in ever prosecuting Anu. At the time of trial, the only admissible evidence against Anu was his own garbled statement. That statement at most suggested that Anu was in the car at the time of the shooting, and this alone would not provide a legally sufficient case against him. *People v. Sanchez*, 61 N.Y.2d 102 (1984). The other statements implicating Anu were made by individuals who were then outside the United States. Jassa, for example, who provided the most damning evidence against Anu, was an Indian national then residing in India. And Vicki, who provided another statement suggesting that Anu had fired a weapon, also resided outside the United States. Thus, the prosecution had far too thin

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[6]Petitioner never argued in state court that the court or the prosecutor had the authority to confer use immunity. His non-specific request for immunity in state court would necessarily be taken as one for transactional immunity, since this was and is the only type of immunity allowed in a New York criminal proceeding.

a basis on which to charge Anu for the murder and attempted murder at the time of petitioner's trial.

This, however, in no way precluded the district attorney's office from pursuing a prosecution later, should sufficient evidence subsequently become available. For example, if the witnesses who made the inculpatory statements were to return to the United States, or if Anu made an unguarded admission to a civilian, the prosecution could legitimately charge Anu later on. Indeed, because no statute of limitations exists in New York for murder charges, *see* N.Y.C.P.L. § 30.10 (1)(a), many state murder cases are brought long after the crime occurs, as new evidence is developed. *See, e.g., People v. Vernace*, 96 N.Y.2d 886 (2001) (upholding indictment in sixteen-year-old murder case by same prosecutor's office as here, based on evidence developed by NYPD "Cold Case Homicide Squad"); *People v. Jones*, 267 A.D.2d 250 (2d Dept. 1999) (seven-year delay); *People v. Hayes*, 39 A.D.3d 1173 (4th Dept. 2007) (sixteen-year delay). In short, the prosecution's inability to file charges early on simply did not suggest that the prosecution could have no legitimate interest in ever bringing charges against the witness. *People v. Adams*, 53 N.Y. 2d 241, 247 (1981) ("Neither, in our view, can the prosecutor be said to have acted in bad faith whenever he refuses to grant absolution to a participant in the crime who has thus far eluded prosecution").

Still further, had the witness been granted immunity, he could readily have colluded with petitioner, his friend and the victims' adversary, to falsely exonerate petitioner. Anu could have claimed

that he alone was responsible for the shootings and that petitioner took no part, and, despite these admissions, could still have avoided any prosecution on murder or attempted murder charges. Moreover, any prosecution of Anu for perjury would be fraught with problems, as the state had only Anu's incoherent prior unsworn statement to establish he was lying. Given these circumstances, it would, again, be reasonable for any prosecutor to be concerned about the prospect of such collusion.

Thus, the prosecution had ample grounds on which to deny Anu immunity – a potential, but currently untenable, prosecution of the witness who petitioner maintained had been directly involved in the incident and who had been implicated by other, then unavailable, witnesses. This is precisely the "potential prosecution of the prospective witness" that even the Third Circuit has deemed "a sufficient governmental interest to countervail a grant of judicial immunity." *United States v. Cohen*, 171 F.3d at 802. Added to this was a very realistic prospect of collusion, about which the prosecution could have done virtually nothing. Because the government had such a strong interest in denying immunity, the trial court would not have been required to grant judicial immunity, even under the Third Circuit's outdated "effective defense" theory. *Id.*

Thus, the facts of this case would produce the same result under either the prosecutorial misconduct or effective defense theories. The case then, is ill-suited to resolve the purported conflict between the circuits, if indeed one were deemed to exist.

CONCLUSION

Contrary to petitioner's contention, the issue presented by this appeal is not the subject of any active conflict among the circuit courts. The disagreement cited by petitioner pertains to an issue not presented by this case, because petitioner did not properly raise it in the state courts. And even on that issue, the split of authority is illusory at best, as the only case to adopt an adverse position to the majority has since limited its own decision to its specific facts. In the absence of a genuine conflict, petitioner has presented no sound reason for this Court to grant review. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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